

# Legislative Notice

Editor, Judy Gorman Prinkey

No. 10

March 24, 1995

## S. 219 — Regulatory Transition Act of 1995

Calendar No. 33

Reported from the Committee on Governmental Affairs on March 16, 1995, with amendments to an amendment in the nature of a substitute, by a party-line vote of 6 to 5. A hearing on S. 219, as well as on proposals to reform the regulatory process was held on February 7, 1995, and a second hearing was held exclusively on S. 219 on February 22, 1995. S. Rept. 104-15 contains minority views.

### NOTEWORTHY

- Opening statements on S. 219 are expected to begin on Monday, March 27. At press time, no unanimous consent agreement for action on the bill had been reached.
- The bill was reported on a party-line vote, indicating the prospects for extended debate on the floor. Accordingly, the prime sponsors, Senators Nickles and Hutchison, joined by Senator Reid, will offer a managers' substitute amendment to S. 219 when it is taken up by the Senate. A summary of the Nickles/Reid substitute begins on page 6.
- The bill as reported would impose a moratorium on all "significant" regulations proposed or finalized from November 9, 1994 through December 31, 1995, with numerous exceptions provided.
- The Nickles/Reid substitute will replace S. 219 with a 45-day "fast-track" congressional review procedure for all federal agency final rules beginning on the date of enactment of the substitute, and a review of all "significant" final rules promulgated between November 20, 1994, and the day before the date of enactment.
- The Nickles/Reid substitute also will place a moratorium on all future "significant" final rules for the duration of the 45-day review period, with certain exceptions.
- A number of amendments may be offered to the bill on the floor by Republican Senators.

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## BILL SUMMARY

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- S. 219, the Regulatory Transition Act, as reported by the Committee on Governmental Affairs, suspends certain significant regulatory actions taken by federal agencies during the **moratorium period**, which begins November 9, 1994, and ends December 31, 1995, unless an act of Congress provides an earlier termination date.
- The moratorium in S. 219 suspends proposed and final rules (including guidelines and statements of agency policy) that are declared to be "significant rulemaking actions" by the Administration using definitions under Executive Order 12866, that are not excepted.
- The moratorium does not apply to the following significant rulemaking actions:
  - licenses (including hunting and fishing); registration; rates; wages; corporate or financial structures; prices; granting a variance; granting an exemption; or granting a petition of relief from a regulatory requirement; any action taken in connection with the implementation of monetary policy or to ensure safety and soundness of federally insured depository institutions; or, any action necessary to permit new or improved applications of technology or allow manufacture, distribution, sale, or use of a substance or product;
  - or
  - significant rules that the President **excludes** from the moratorium by stating in writing that the rule is one of the following:
    - "(A) necessary because of an imminent threat to human health or safety or other emergency;
    - "(B) necessary for the enforcement of criminal laws;
    - "(C) related to a regulation that has as its principle effect fostering economic growth, repealing, narrowing, or streamlining a rule, regulation, administrative process, or otherwise reducing regulatory burdens;
    - "(D) issued with respect to matters relating to military or foreign affairs or international trade;
    - "(E) principally related to agency organization, management, or personnel;
    - "(F) a routine administrative action, or principally related to public property, loans, grants, benefits, or contracts;

"(G) limited to matters relating to negotiated rulemaking carried out between Indian tribes and the applicable agency under the Indian Self-Determination Act Amendments of 1994 (Public Law 103-413; 108 Stat. 4250); or

"(H) limited to interpreting, implementing, or administering the internal revenue laws of the United States."

- The act **prohibits judicial review** with respect to any determination or agency interpretation of whether a regulation is included or excluded from the moratorium. Judicial review would be available under other relevant statutes, such as the Administrative Procedures Act, for the other provisions in the Act.
- A five-month grace period will follow the end of the moratorium period for agencies to promulgate proposed and final rules suspended by the moratorium, in order to avoid a tidal wave of regulations being issued on the day after the moratorium period ends. In addition, compliance dates contained in the proposed and final rules suspended by the moratorium could not be earlier than five months after the end of the moratorium period.
- Future deadlines will be extended five months if they are dependent upon proposed or final rules suspended by the moratorium. Note, however, that compliance deadlines established by final rules promulgated prior to the moratorium period would NOT be suspended. (The only exception to this is an earlier rule which is intertwined with a rule covered by the moratorium).
- The following amendments were adopted by the Governmental Affairs Committee after adoption of the Chairman's substitute:
  - 1) Exemption of regulations to upgrade safety and training standards for commuter airlines to those of major airlines. (Glenn)
  - 2) Exemption of EPA regulations regarding public exposure to lead from house paint, soil, or drinking water. (Glenn)
  - 3) Expansion of the scope of the moratorium to include regulations which place restrictions on the recreational and commercial use of public lands. (Stevens)
  - 4) Exemption for railroad crossing regulations. (Thompson)
  - 5) Exemption for regulations to ensure the safety and soundness of the Farm Credit System institutions or to protect the Farm Credit Insurance Fund. (Cochran)
  - 6) Expansion of the scope of the moratorium to ensure certain wetlands designations are covered. (Grassley)

- 7) Exemption for certain negotiated regulations related to reforming federal policies concerning Indian self-governance and self-determination. (McCain)
- 8) Exemption of regulations which enforce anti-discrimination laws. (Levin)
- (9) Clarification of exemption for regulations of hunting, fishing, and camping. (Pryor)
- 10) Exemption of regulations on aircraft overflights on national parks. (Akaka)
- 11) Exemption of regulations regarding compensation to Persian Gulf War veterans for disability for undiagnosed illnesses. (Glenn)
- 12) Exemption of regulations to improve aircraft safety, including action to improve airworthiness of aircraft engines. (Glenn)

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### OTHER VIEWS

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***Senators Glenn, Nunn, Levin, Pryor, Lieberman, and Akaka***

Minority views were filed by Senators Glenn, Nunn, Levin, Pryor, Lieberman, and Akaka. The Senators stated that "while comprehensive regulatory reform is clearly needed for the Federal government, this legislation is not an appropriate or necessary way to achieving such reform as its proponents claim." The Senators stated, "A moratorium does nothing toward real regulatory reform." In addition, the Senators discussed their concerns with the uncertainties and arbitrariness of the provisions that determine which regulations and agency guidelines would be covered by the moratorium and which would not. In this connection, they emphasized the ambiguous consequences of granting authority to the President to except significant rules needed to meet an "imminent threat to health and safety," which they believed could be problematic with respect to a moratorium that could last over a year. In addition, the Senators objected to the bill's provision that extended statutory and court deadlines. Finally, the Senators expressed concerns about an amendment adopted in committee that would place many regulations under the moratorium if they withdraw or restrict recreational, subsistence, or commercial use of federal lands.

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## **COST**

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### **Federal Government**

On March 15, 1995, the Director of the CBO sent a letter to the Committee in which CBO estimated the bill, as ordered reported by the Committee on Governmental Affairs, would result in less than a net \$500,000 in annual discretionary administrative and other costs to the federal government. In addition, CBO stated that enacting S. 219 could affect direct spending, but that the "consequences of the bill are not sufficiently clear" for CBO to determine whether there would be any direct spending, or what the magnitude would be. Nevertheless, because the bill *could* affect direct spending, pay-as-you-go procedures would apply.

### **State and Local Governments**

In addition, the CBO stated that while S. 219, as reported, would not affect any routine, ongoing payment to state and local governments, the bill could affect federal payments that are subject to rulemaking during the period covered by the bill. CBO added that it is possible that some regulatory actions that would otherwise provide relief to state and local governments could be delayed or precluded, thereby increasing state and local governments' costs for various activities.

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## **POSSIBLE AMENDMENTS**

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Nickles/Reid. A managers' substitute amendment to provide for a 45-day review procedure to provide the Congress with the opportunity to enact a joint resolution of disapproval of certain already finalized federal agency rules and all future federal agency final rules. See detailed summary, attached.

Bond. To repeal the prohibition on judicial review of agency regulatory flexibility analysis, statements of the impact on small businesses and small local governments required pursuant to the Regulatory Flexibility Act (1980).

Grassley. To place a moratorium on future designations of property as "wetlands" until December 31, 1995.

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# **The Nickles/Reid Regulatory Review Substitute**

## **An Amendment to S. 219, The Regulatory Transition Act**

The substitute provides for a 45-day review period following the issuance of any federal agency final rule during which the Congress, using a "fast track" procedure, may enact a joint resolution of disapproval, which must be presented to the President for his action.

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### **Establishes a 45-day Congressional Review Period:**

- The substitute provides for a 45-day period after publication of any final rule by a federal agency, during which the Congress has an opportunity to review the rule and, if it chooses, enact a joint resolution of disapproval on a fast-track basis.
- Upon issuing a final rule, a federal agency must send to Congress a report containing a copy of the rule and the complete cost/benefit analysis, if any, prepared for the rule. The 45-day period for congressional review would begin on the date Congress receives the agency's report on the rule, or on the date the final rule is published in the *Federal Register*, whichever is later.
- Any Senator or Representative may introduce a resolution of disapproval of an agency final rule. The joint resolution of disapproval, which declares that the rule has "no force or effect," will be referred to the committee(s) of jurisdiction.
- The joint resolution of disapproval may be vetoed by the President, and Congress has the opportunity to override the veto.

### **Provides a Lookback to November 20, 1994:**

- Provides a 45-day review process outlined above for any "significant" (as defined by Executive Order 12866<sup>1</sup>) final regulation which became final on or after November 20, 1994, and prior to the date of enactment of this substitute moratorium legislation. These significant final rules would not be suspended before or during this 45-day congressional "lookback" review period, which would begin on the date of enactment of this substitute.

### **Provides Expedited Review Procedures:**

- Congress will have 45 calendar days to review final rules and consider a resolution of disapproval, under the expedited procedures established in this Act. All final rules that are published less than 60 days before a Congress adjourns *sine die*, or that are published during *sine die* adjournment, shall be eligible for review and "fast-track" disapproval procedures for 45 days beginning on the 15th session day following the date the new Congress convenes.

- If the House or Senate committees of jurisdiction have not reported the resolution of disapproval within 20 calendar days from the date Congress receives the agency's report on the rule, or on the date the final rule is published in the *Federal Register*, whichever is later, the Majority Leader of the Senate or the Majority Leader of the House of Representatives, may discharge the committee(s) from further consideration and place the resolution of disapproval directly on the Calendar.
- The resolution of disapproval may be placed on the House or Senate Calendar by the appropriate committee(s) or by the respective Majority Leader. The motion to proceed is privileged and is not debatable. Once the Senate has moved to proceed to the resolution of disapproval, debate on the resolution is limited to ten hours, equally divided, with no motions (other than a motion to further limit debate) or amendments in order. If the resolution passes one body, it is eligible for immediate consideration on the floor of the other body.

#### **Delays the Effective Date of Future Significant Rules:**

- Future "significant" final rules, which the Act defines as final rules that meet the criteria set forth in Executive Order 12866, may not take effect until at least 45 days after the rule is published. However, the President, by Executive Order, may exempt "significant" final rules addressing imminent threats to health and safety, or other emergencies, criminal law enforcement, or matters of national security from the 45-day minimum delay in the effective date. The decision by the President to exempt any significant final rule from the delay is not subject to judicial review.
  - There is no suspension of effective dates during the 45-day congressional review period for "significant" rules promulgated prior to the date of enactment of the substitute, nor for any non-"significant" final rules promulgated either before or after the date of the enactment of the substitute.
  - Under current law, most rules already are delayed by 30 days pending the filing of an appeal.
  - "Significant" final rules would not go into effect after the 45-day period if the joint resolution of disapproval has passed both Houses within that time. If the joint resolution of disapproval is vetoed, the effective date of the final rule will continue to be postponed until 30 legislative days have passed after the veto, or the date on which either House fails to override the veto, whichever is earlier.
1. Definition of significant rule in Executive Order 12866: 1)has an annual effect on the economy of \$100 million or more or adversely affects in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; 2)creates a serious inconsistency or otherwise interferes with an action taken or planned by another agency; 3)materially alters the budgetary impact of entitlement, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or 4)raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866.